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No. 73-926

In the Supreme Court of the United States

OCTOBER TERM, 1973

PAUL EPTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	11

CITATIONS

Cases:	
Brady v. *Maryland*, 373 U.S. 83	10
Escobedo v. *Illinois*, 378 U.S. 478	11
Giglio v. *United States*, 405 U.S. 150	10
Massiah v. *United States*, 377 U.S. 201	11
Constitution and statutes:	
United States Constitution, Sixth Amendment	2, 11
18 U.S.C. 371	2
18 U.S.C. 2314	2
22 D.C. Code 108	2
22 D.C. Code 1801	2
22 D.C. Code 2201	2

533-479—74——1

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 485 F. 2d 941.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973. A petition for rehearing was denied on October 15, 1973. On November 15, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to December 14, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below correctly concluded that certain exculpatory evidence the prosecution inadvertently failed to produce until after trial related only to certain counts, and did not require vacating the convictions on the other counts.

2. Whether admission of petitioner's conversations with an informant, recorded before petitioner was arrested or indicted, violated his Sixth Amendment right to counsel.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on six counts of burglary (22 D.C. Code 1801) (Counts 2, 6, 9, 11, 17, 20); six counts of grand larceny (22 D.C. Code 2201) (Counts 3, 7, 10, 12, 18, 21); five counts of interstate transportation of stolen property (18 U.S.C. 2314) (Counts 4, 5, 13, 15, 19); one count of bringing stolen property into the District of Columbia (22 D.C. Code 108) (Count 8); and one count of conspiring to commit the above described offenses (18 U.S.C. 371) (Count 1).[1] Petitioner was sentenced to imprisonment for six years and eight months to twenty years, and fined $60,000. The court of appeals

[1] The text of the lengthy indictment is set out in the trial transcript (Tr. 3791–3819). Also charged in the indictment were co-defendants, Michael Lemonakis, Alfred Dolder, and Harry Schmidt. Lemonakis was tried with petitioner and was convicted of the fourteen counts in which he was named in the indictment. Dolder pleaded guilty to various counts, and testified at trial as a government witness. Schmidt remained a fugitive until his death in 1971 (Pet. App. 2a–3a, n. 1).

vacated petitioner's conviction on Counts 2, 3, 4, 5, 6, and 7, and remanded the case for dismissal of Counts 2 through 5, and for resentencing on the judgments of conviction on the remaining thirteen counts, which were affirmed (Pet. App. 47a).[2]

1. The facts are detailed in the opinion below. They disclose a series of burglaries in the Georgetown section of Washington, D.C. in 1969, in which James Scouloukas, who was a member of the Metropolitan Police Department, Lemonakis, Dolder, Schmidt and petitioner were involved.

Alfred Dolder, a co-conspirator, testified at trial that after the first burglary on March 26, 1969, he pointed out to the other conspirators that their operation lacked the essential element of a "fence." At that time Scouloukas told Dolder "that he thought he had a fence; that he thought he had a connection through an interior decorator in Georgetown * * *. He was going to meet with him the next day" (Tr. 303–304). It was the government's contention at trial, and the evidence at trial showed, that petitioner was the "fence" whom Scouloukas sought.

Herbert Knight testified that in early 1969 he had listened to a telephone conversation between Schmidt and petitioner in which petitioner accused Schmidt of "holding out some merchandise" (Tr. 1014). Knight

[2] Counts 6 and 7 were vacated as inconsistent with Count 8, but the court noted that the sentences on Counts 6 and 7 were concurrent with the remaining counts for burglary and grand larceny.

also recalled seeing petitioner carry suitcases out of the Schmidt apartment in early 1969 (Tr. 1032).[3]

Mary Wortman, an interior decorator and designer who was acquainted with petitioner, testified that in the summer of 1969 petitioner asked her if he could store some things in her home (Tr. 384). She consented, but a few months later she noticed that an upstairs closet in her home had become cluttered with petitioner's suitcases, boxes and pillowcases. When she examined the contents of this closet, she discovered antique silver sets, antique coffee pots, porcelain and other art objects (Tr. 392–393, 397). She immediately telephoned petitioner; when he told her that he had purchased the items from a dealer for $10,000, she ordered him to remove them from her home, stating that he could not have purchased them for ten times that price (Tr. 394). Mrs. Wortman estimated that the value of property in her closet was a quarter of a million dollars (Tr. 397).[4] Her last words to petitioner prior to his departure after removing the items were that the merchandise "had to be hot," and that she resented his use of her home for storing it (Tr. 459).

In removing the items, a small silver bobeche and fork were left behind. Mrs. Esther Lewis identified these two items at trial as having been stolen from her home in the March 26, 1969 burglary (Tr. 22–23).

[3] Schmidt's apartment was apparently used as an initial storage place for the stolen goods (Tr. 999–1000, 1596).

[4] Mrs. Wortman was qualified as an expert witness in the field of interior decoration and appraisal of antiques (Tr. 382–383).

Items stolen from twelve other houses were identified at trial as having been in petitioner's possession, either stored at Mrs. Wortman's house or in Robert G. Baker's house in October and November 1969 (Tr. 824–825, 836, 841–847), or returned by petitioner during the trial (Tr. 3463–3479).

Petitioner sold a stolen clock to Mrs. Wortman before she discovered the value of the things he was storing in her house (Tr. 385), and subsequently sold a stolen chest of silver to Mrs. Baker (Tr. 842–844, 1074).

In late August 1969, the home of Marion Oats Charles was burglarized. Among other items stolen were an extensive collection of Faberge jewels and art objects. In October 1969, petitioner went to an antique store in New York which specialized in Russian antiques and told the proprietor of the store that he had certain Faberge antiques either in the District of Columbia or outside of the United States. The proprietor identified several of the items depicted in Mrs. Charles' appraisal photographs as identical to items that petitioner had described to him (Tr. 607–609).

A few months later, in January 1970, petitioner showed Michael Arpad, a Washington antique dealer, a book of photographs. Arpad identified objects depicted in the appraisal photographs of Mrs. Charles as identical to the antiques which petitioner indicated he had. Petitioner also displayed to Arpad a jeweled enamel Faberge clock. Arpad recognized this clock as one he had appraised in 1967 for Mrs. Charles, and called the police (Tr. 736–739).

Police investigations of the Georgetown burglaries had aroused suspicion concerning Scouloukas, who resigned from the police department in December 1969 (Tr. 1956–1957; Pet. App. 4a). After further investigation, aided by Arpad's information, the matter was presented to the grand jury on June 9, 1970 (Tr. 1724; Pet. App. 4a). Later that month, Scouloukas arranged to cooperate in the investigation, in return for the assurance that his statements would not be used against him (Tr. 1436–1437; Pet. App. 5a). In July 1970, Scouloukas agreed to the recording of his conversations with Lemonakis and petitioner, in order to corroborate his charges (Tr. 1727).

Scouloukas and petitioner had two face-to-face meetings while Scouloukas was wearing a miniature transmitter which recorded their conversation on devices operated by detectives. These recordings were introduced at trial over petitioner's objections. In addition, Detective Moyer overheard nearly all of the conversation during the second meeting, and testified as to its content (Tr. 1865–1870, 1892–1904, 2235–2236).

During the first conversation Scouloukas and petitioner discussed "the gal on Bancroft Street" who had a clock which Scouloukas had sold to petitioner. Petitioner stated that he would talk to the woman and try to get it back (Tr. 1868).[5]

[5] This was apparently a reference to one of the clocks stolen from the Charles residence which petitioner had sold to Mrs. Wortman, who resided at 2137 Bancroft Place (Tr. 385). It was petitioner's possession of one of the other Charles clocks which caused Arpad to notify the police (Tr. 736–739).

Another conversation was monitored on July 26, 1970 (Tr. 1892). Scouloukas and petitioner discussed the fact that a grand jury probe was under way, and petitioner said that the grand jury was trying to indict him for conspiracy (Tr. 1903). Scouloukas expressed anger at petitioner for taking "that thing to Arpad." Petitioner responded that "they were on a fishing party," that "it was Arpad's word against his," and that Arpad was a "fag" who was after petitioner (Tr. 1899–1900).

Petitioner told Scouloukas that if he had any money he would give it to Scouloukas and "say goodbye," and that his lawyer had told him "to deny everything" and say that he was "caught up in a frame" (Tr. 1896–1897). Petitioner warned Scouloukas not to speak over the telephone, and told him that, if asked about prior calls, he should say that he was calling about money that he owed petitioner (Tr. 1898).

The conversation shifted to petitioner's girlfriend, and the fact that she had received a grand jury subpoena. Petitioner said that even though she thought some jewelry she had seen had been stolen, she would say that it was "coins and stuff" that he had brought back from a trip to Peru (Tr. 1900).

Finally petitioner proposed that one of them could "come out whole and could help the other guy later." Petitioner concluded that since he was the "professional * * * who had the brains" and could be "out earning bread," he could take care of Scouloukas after Scouloukas completed a prison term (Tr. 1905–1906).

3. Petitioner testified in his own defense. He claimed that he did not know the items that he had been buying from Scouloukas had been stolen until the latter so informed him on June 10, 1970, the day after the matter was presented to the grand jury. Petitioner further testified that when he threatened to call the police, Scouloukas threatened to implicate him in the burglaries. Thereafter, according to petitioner, Scouloukas attempted to blackmail him into giving him money to leave town (Tr. 2658–2661, 2903).

ARGUMENT

1. Following the trial, at which petitioner was convicted on all counts in the indictment, the government revealed to the court below that, although it had turned over to petitioner all known material required to be produced pursuant to a pre-trial order of the district court, an exculpatory memorandum of a May 13, 1971 interview between Scouloukas and an Assistant United States Attorney had inadvertently been omitted from the disclosed material (Pet. App. 41a). In the memorandum, Scouloukas stated that he did not approach petitioner with regard to joining the conspiracy until after the first burglary (of the Esther Lewis home) had been accomplished on March 26, 1969, contrary to what he had told the grand jury (Pet. App. 41a). Upon the government's motion, the court below vacated petitioner's conviction on Counts 2 through 5, and remanded the case to the district

court for dismissal on those counts, and resentencing on the remaining counts (Pet. App. 42a).[6]

Petitioner argues that the court below erred when it determined that this memorandum was material only to those counts which the court ordered dismissed, and that in any event, the court was "obligated to remand the case for an evidentiary hearing to determine whether the trial was tainted by prosecution falsification" (Pet. 20). On the contrary, the facts amply justify the holding of the court below.

The statement in the memorandum that Scouloukas did not approach petitioner about joining the conspiracy until after the first burglary had been committed, is consistent with Dolder's testimony at trial that after the first burglary Scouloukas stated that he was going to make contact with an interior decorator in Georgetown the next day. Nor is it likely that the production of the memorandum would have led peti-

[6] Counts 2 through 5 of the indictment charged petitioner, together with his other co-defendants, of burglary of the Esther Lewis home on March 26, 1969 (Count 2), as well as grand larceny (Count 3) and interstate transportation of stolen property (Counts 4 and 5) growing out of that burglary (Tr. 3802, 3805, 3815). Entry of the Esther Lewis residence was also the second of twenty-six overt acts alleged in the conspiracy count (Count 1) (Tr. 3794).

The court below also vacated petitioner's conviction on Counts 6 (burglary of Edwin Bolland's residence on August 2, 1969) and Count 7 (grand larceny of Bolland's property), because those convictions overlapped the conviction on Count 8 (bringing Bolland's stolen property into the District of Columbia) (Pet. App. 45a–47a).

tioner to change his defense. The memorandum would have been useful to show that petitioner had not joined the conspiracy prior to March 26, 1969, but it in no way refutes the overwhelming evidence that petitioner did join the conspiracy shortly thereafter.

To remand petitioner's case for a retrial on the counts of the indictment not dismissed by the court below would be to re-try his case on the identical facts which led to his conviction in the initial trial. The court below correctly concluded that the memorandum was not material to the issue of the petitioner's guilt on the counts for which he stands convicted, and a new trial was properly denied. *Brady* v. *Maryland,* 373 U.S. 83; *Giglio* v. *United States,* 405 U.S. 150, 154.[7]

Petitioner's argument that the court below should have remanded the case for an evidentiary hearing to determine whether the conviction on the other counts was "tainted by prosecution falsification" (Pet. 20) is likewise without merit. The court explained why it concluded that non-disclosure of the memorandum was simply a mistake by the government (Pet. App. 41a, n.32), and petitioner offers nothing to cast doubt on that conclusion. Nor does he indicate what instances of "prosecution falsification" might be revealed in a hearing.

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[7] Petitioner's argument (Pet. 16) that the government characterized petitioner as a "mastermind" of the conspiracy, and that the court below erroneously "analyzed the issue as though the jury had to find not that [petitioner] was a conspirator, but merely that he was a fence," is unpersuasive. The trial court properly instructed the jury as to what they must find to convict as a conspirator, as well as on the substantive counts (Tr. 3798–3802), and there is substantial evidence to support the jury finding.

2. Petitioner challenges the admissibility of the tape recordings of his conversations with Scouloukas, alleging violation of his Sixth Amendment right to counsel (Pet. 21–23). His argument is that "putting *Massiah* and *Escobedo*[8] together, * * * the admission of the Scouloukas-Enten conversations violated the Sixth Amendment, even though Enten had not been indicted and was not in custody at the time of the conversations" (Pet. 22). The court of appeals, upon whose opinion we rely (Pet. App. 19a–22a), correctly rejected the contention.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[8] *Massiah* v. *United States*, 377 U.S. 201, and *Escobedo* v. *Illinois*, 378 U.S. 478.

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